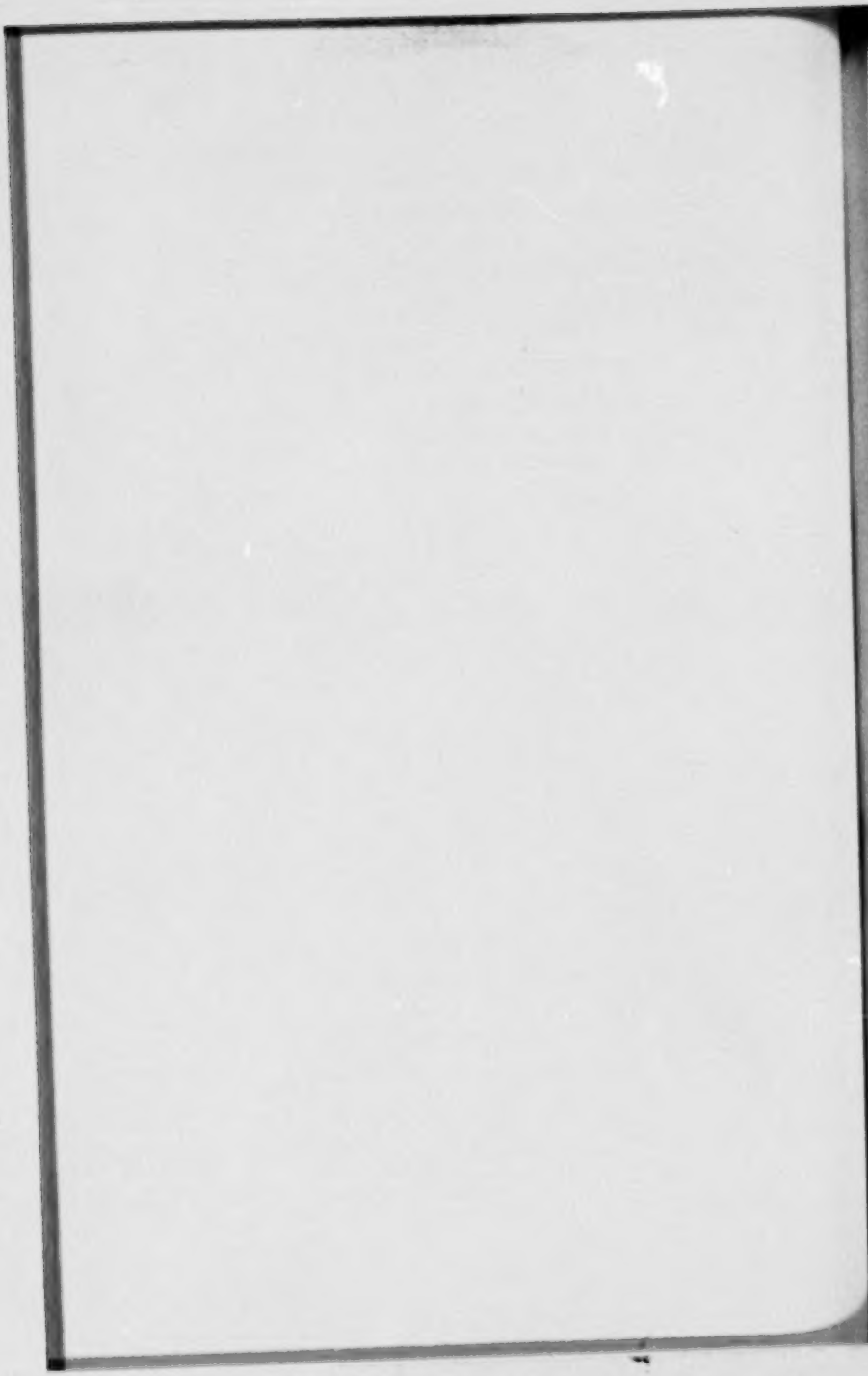

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE COMPANY, Petitioners

v.

UNITED STATES OF AMERICA, ADA BOTTONE, FLEETWOOD PAVING CORPORATION, and COLONIAL SAND AND STONE CO., INC.

COLONIAL SAND AND STONE CO., INC., Petitioners

v.

UNITED STATES OF AMERICA, ADA C. BOTTONE, doing business as MARIO'S MIRAMARE RESTAURANT,

FLEETWOOD PAVING CORPORATION, ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE CO.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	6
Conclusion	17
Appendix:	
(a) Opinion of New York State Court of Appeals	18
(b) Judgment and Remittitur of New York State Court of Appeals	24
(c) Order of New York State Court of Appeals on Motion for Reargument and Amendment of Remittitur	28
(d) Judgment of New York State Supreme Court, Westchester County, Entered on Remittitur of the Court of Appeals	30
(e) The Federal Lien for Taxes	33
(f) The New York State Lien Law	34

CITATIONS

Cases:	
Albert Pick Co., Inc. v. *Travis*, 6 F. Supp. 486	13
Barter v. *Hawksworth*, 102 Misc. 242, 169 N.Y.S. 475	12

PAGE

Corbin-Kellogg Agency, Inc. v. *Tasker*, 248 App. Div. 58, 289 N.Y.S. 156 11

Cranford Co. v. *L. Leopold and Co.*, 298 N. Y. 676, 82 N. E. 2d 580, affirming 273 App. Div. 754, 75 N.Y.S. 512, affirming 189 Misc. 388, 70 N.Y.S. 183 12

Einach's Estate, In re, 1 Misc. 2d 537, 146 N.Y.S. 2d 240 12

Ellis' Estate, Matter of, 110 Misc. 192, 179 N.Y.S. 873 12

Fidelity and Deposit Company of Maryland v. *New York Housing Authority*, 241 F. 2d 142 .....7, 8, 14, 15, 16, 17

Franklin, Matter of, 26 Misc. 107, 56 N.Y.S. 858 12

Heintzelman Construction Co., In re., 34 F. Supp. 109 11

Morgan v. *Commissioner*, 309 U. S. 78 8

Powers' Estate, Matter of, 75 Misc. 85, 134 N.Y.S. 967 12

Ridgefield Supply Co. v. *Rosen*, 1 Misc. 2d 675, 147 N.Y.S. 2d 337 .....11, 12

Rosicato v. *Manera*, 192 Misc. 607, 81 N.Y.S. 2d 353 11

Stiles' Estate, In re, 126 Misc. 715, 215 N.Y.S. 134 12

Treister & Son, Inc., In re, 145 F. Supp. 144 .. 11

United States v. *Acri*, 348 U. S. 211 14

United States v. *Bess*, Nos. 395 and 410, 1957 Term, decided June 9, 1958 .....8, 10, 13, 14, 15

United States v. *City of New Britain*, 347 U. S. 81 .....14, 15

COPY BOUND CLOSE IN CENTER

PAGE

United States v. *Colotta*, 350 U. S. 808 14

United States v. *Kings County Iron Works, Inc.*, 224 F. 2d 232 ..... 14, 16

United States v. *Liverpool & London & Globe Insurance Co., Ltd.*, 348 U. S. 215 14

United States v. *R. F. Ball Construction Co.*, 355 U. S. 587 ..... 8, 15

United States v. *Scovil*, 348 U. S. 218 14

United States v. *Security Trust and Savings Bank*, 340 U. S. 47 ..... 14.

United States v. *Vorreiter* 355 U. S. 15 14

United States v. *White Bear Brewing Co.*, 350 U. S. 1010 14

United States Fidelity and Guaranty Co. v. *Triborough Bridge Authority*, 297 N. Y. 31, 74 N. E. 2d 226 16

Wade v. *Nassau Suffolk Lumber and Supply Corp.*, 275 App. Div. 864, 89 N.Y.S. 2d 294 12

Waldman v. *D. & V. Plumbing & Heating Contractors, Inc.*, 102 N.Y.S. 2d 787 12

Wickes Boiler Co., Inc. v. *Godfrey-Keeler Co., Inc.*, 121 F. 2d 415 (reversing 116 F. 2d 842) certiorari denied, 314 U. S. 686 13

atutes:

Bankruptcy Act:

Section 64 a (5), 11 U.S.C. 104 a (5) 13

Section 70 a, 11 U.S.C. 110 a 13

PAGE

Internal Revenue Code of 1939:

Section 3670. 11 U.S.C. (1952 ed.) 3670 ....3, 7, 7

Section 3671, 26 U.S.C. (1952 ed.) 3671 .... 3, 8

Section 3672, 26 U.S.C. (1952 ed.) 3672 15

Internal Revenue Code of 1954:

Section 6321, 11 U.S.C. (1952 ed., Supp. II) 6321 3

Section 6322, 11 U.S.C. (1952 ed., Supp. II) 6322 3

New York Lien Law:

Section 3 10

Section 36a 3, 4, 9, 11, 12

31 U.S.C. 191 (R. S. 3466) 12

Miscellaneous:

"Act, Recommendation and Study relating to the Fund Provisions of the Lien Law," 1942 Report, New York State Revision Commission 10, 11

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IN THE

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OCTOBER TERM, 1957

No. .....

ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE COMPANY, Petitioners,

v.

UNITED STATES OF AMERICA, ADA BOTTONE, FLEETWOOD PAVING CORPORATION, and COLONIAL SAND AND STONE CO., INC.

COLONIAL SAND AND STONE CO., INC., Petitioners,

v.

UNITED STATES OF AMERICA, ADA C. BOTTONE, doing business as MARIO'S MIRAMARE RESTAURANT,

FLEETWOOD PAVING CORPORATION, ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE CO.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioners Robert Aquilino and Joseph Spero, doing
siness as Home Maintenance Co. and Petitioner Colonial
nd and Stone Co., Inc. pray that a writ of certiorari
ue to review the judgment of the New York Court
Appeals entered in the above-captioned cases on Decem-
r 5, 1957, as amended on April 3, 1958.

Opinions Below

The opinion of the New York Court of Appeals (Pe
App. (a) p. 18) is reported at 3 N. Y. 2d 511, 146 N. E.
774. The opinion of the Appellate Division, Second D
partment (R. 91-94) is reported at 2 A. D. 2d 747, 1
N.Y.S. 2d 268. The opinion of the Supreme Court, We
chester County (R. 76-78) is reported at 140 N.Y.S. 2d 3

Jurisdiction

The judgment of the New York Court of Appeals w
entered on December 5, 1957 (Pet. App. (b) p. 24). A m
tion for rehearing was denied and the remittitur amend
on April 3, 1958 (Pet. App. (c) p. 28). The jurisdicti
of this Court is invoked under 28 U.S.C. 1257 (3).

Question Presented

Section 3670 of the Internal Revenue Code of 1939 i
poses a tax lien on all "property and rights to property
of a defaulting taxpayer. Under New York law, all mone
accruing to the credit of a general contractor or paid ov
to him, arising from the improvement of real propert
constitute trust funds for the benefit of subcontractor
laborers and materialmen, to the extent of their unpa
claims for the work, labor, services and material, the fu
nishing and rendition of which created the credit-fund
moneys paid over.

The question presented is whether the general contra
tor's interest, solely as trustee, in the res of this stat
torily-created trust constitutes "property" or "rights t
property" under the federal tax lien law.

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Statutes Involved

The pertinent provisions of the federal tax lien law and the New York law are set forth in an appendix, *infra*, pages 33 and 34.

Statement

Petitioners are subcontractors, laborers and materialmen who are statutory beneficiaries of a trust under New York Lien Law, Section 36-a, *infra*, page 34. They instituted two separate suits in the New York Supreme Court, Westchester County, to reach their beneficial interest under this trust. By stipulation of counsel, the two cases were heard and tried together both in the trial court and in the subsequent appeals (R. 48).

The undisputed facts may be summarized as follows: On December 27, 1951, the Collector of Internal Revenue, Albany District, received an assessment for unpaid withholding taxes against Fleetwood Paving Corporation in the amount of $4,464.70 (R. 70). On March 21, 1952 the Collector received an additional tax assessment against Fleetwood, this time in the amount of $3,168.00 (R. 71). Under the provisions of 26 U.S.C. (1952 ed.) and 3670 and 3671[1], *infra*, page 33, the United States obtained a statutory lien on all the taxpayer's "property and rights to property" by virtue of the Collector's receipt of these assessments.

Subsequently, the taxpayer contracted with Mrs. Ada Bottone to make certain improvements on her newly-acquired restaurant which she styled Mario's Miramare Restaurant (R. 67).[2]

---

[1] These provisions are incorporated in the Internal Revenue Code of 1954 as 26 U.S.C. (1952 ed., Supp. II) 6321 and 6322.

[2] The exact date of this contract does not appear in the record. However, it necessarily occurred subsequent to July 8, 1952, the date on which Ada Bottone acquired title to the restaurant (R. 66). In any event, the exact date of this contract is immaterial.

On August 25, 1952, the taxpayer entered into a subcontract with petitioners Aquilino and Spero, doing business as Home Improvement Company (R. 26), under which these petitioners agreed to rebuild the front porch and reservice the walls, floor and steps of the side porch of Mrs. Bottone's restaurant (R. 29-30). Petitioners Aquilino and Spero performed the subcontract, but remain unpaid in the amount of $1400.00 (R. 26). Under New York Lien Law, Section 36-a, petitioners Aquilino and Spero are beneficiaries of a trust consisting of the funds and moneys which become due from and payable by Mrs. Bottone by virtue of the work, labor and material furnished and performed by petitioners, and they subsequently instituted this suit to reach their beneficial interest (R. 23-29).

Sometime between October 2 and October 8, 1952, Petitioner Colonial Sand and Stone Co., Inc. sold to the taxpayer, Fleetwood, some stone and cinders for use in the construction which the taxpayer had undertaken in connection with its contract with Mrs. Bottone (R. 62). The agreed purchase price for this material was $896.25 (R. 62). The taxpayer failed to pay Colonial (R. 62) and it too filed suit to reach such earned funds which comprised a trust fund for their benefit under the New York Lien Law, Section 36-a (R. 33-42).

In her answer in each of the actions, Mrs. Bottone admitted that she owed $2,200.00 for the improvements made by petitioners as subcontractors and materialmen of the defaulted taxpayer, but stated that the United States had served notice of its assertion of a tax lien against such fund (R. 31-32, 44). She then filed a motion requesting that both actions be dismissed as to her upon her deposit of the $2200.00 with the Clerk of the County, and that the United States be substituted as a party defendant in view of its assertion of a right to the fund superior to petitioners' (R. 49-50). The motion was granted, and the court ordered deposit of the $2200.00 with the Clerk of the County, the

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itution of the United States as party defendant, and ce of the order on the United States (R. 50). The rnment subsequently filed answers in each suit assert- nat its tax lien gave it rights in the fund superior to oners' (R. 51-58). By stipulation of the parties, both were heard and tried together (R. 48).

itioners Aquilino and Spero, Petitioner Colonial Sand Stone Co., Inc. and the Government each moved for ary judgment (R. 13-15, 59-61, 68-69). The trial ruled that petitioners' beneficial interest in the trust which consisted of the money deposited with the prevailed against the Government's tax lien and d pro rata distribution of the money between Peti- s Aquilino and Spero and Petitioner Colonial Sand tone Co., Inc. (R. 76-78). The Government appealed Appellate Division of the Supreme Court which d (R. 91-94). A unanimous court ruled that "there present, no debt due and owing from Bottone to axpayer] to which [the Government's] lien may " (R. 93). The Government thereupon appealed to w York Court of Appeals, which reversed, ruling e trust funds, constituting Mrs. Bottone's indebted- r the improvements made to her restaurant by the ners was "quite obviously within the statutory terms rty and rights to [such] property' belonging to the er." (Pet. App. (a) p. 21, 3 N. Y. 2d at 516, N. E. While indicating in a footnote that one of its own s suggests a contrary conclusion, the court felt to follow what it considered to be indications in the e direction in more recent federal opinions (Pet. a) p. 22, 3 N. Y. 2d at 516, 146 N. E. 2d at 778).[3] orhis, J. dissented. Petitioners' motion for rehear- denied (Pet. App. (c) p. 28), and this petition for ri followed.

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[3] *infra*, p. 22.

Reasons For Granting the Writ

The New York Court of Appeals has ruled that, despite the fact that petitioners are beneficiaries of the statutorily-created trust funds in question, such funds are the property of the trustee and not of the beneficiaries for purposes of the Federal tax lien law.

In effect the court has ruled that New York law does not and can not give any protection to a subcontractor, materialman or laborer against an outstanding federal tax lien on the contractor irrespective of when the tax lien arose or was filed. In this state of the law, the attachment of the federal tax lien may well be tantamount to a judgment of financial ruin for a general contractor, subcontractor, materialman or laborer for no well-advised subcontractor, materialman or laborer will deal with a general contractor, knowing that any funds which accrue as a result of the work, labor and materials furnished and performed will be subject first to payment of the Government's tax lien. Essentially, the reluctance of a subcontractor, materialman or laborer to enter into contractual relations with a general contractor whose earned funds may become subject to an unknown outstanding federal tax lien, is the materialman or laborer's justifiable fear that the Government will take the corpus of the state-created trust to pay the general contractor's taxes. The result is that the general contractor-taxpayer is hindered from earning the very profit which would enable him to pay his tax lien. Accordingly, the decision below not only tends to strangle the contractor financially, but produces no concomitant gain to the Government.*

---

* This is no far-fetched prophecy of doom, but a practical effect of the decision below. This result in practice will be reached in this way: A contractor who, we may assume from the existence of the federal tax lien, is in a somewhat shaky financial condition, will attempt to extricate himself by the undertaking of several new projects. He is awarded a contract and seeks to perform it by

(*Footnote continued on following page*)

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is submitted that this result finds no support in reason
the language of the federal tax lien statute, 26 U.S.C.
2 ed.) 3670, which provides the Government with a lien
on the taxpayer's property. Moreover, the decision
conflict with the theory of the controlling authority in
Court of Appeals for the Second Circuit, *Fidelity and*
sit Company of Maryland v. *New York Housing Au-*
ty, 241 F. 2d 142. It is also in direct conflict with at
four cases holding that the contractor's interest in
trusts is not "property" for purposes of the Bank-
y Act and is therefore not part of the bankrupt's
e.

th the increase in business failures as a result of the
nt recession, cases controlled by the instant case will
the courts with growing frequency. It is likely that,
this Court passes on this question now, it will be
to do so again and again in the next few years. In
circumstances, petitioners submit that review by this
is merited.

The Statutory Trust. The Internal Revenue Code, 26
(1952 ed.) 3670, *infra*, p. 33, imposes a lien on all
erty and rights to property" of a defaulting tax-
this lien attaches from the time the tax assessment

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ote continued from preceding page)

racting with various materialmen and laborers. These ma-
n and laborers, however, will often not subcontract with the
or unless he provides a payment bond. A surety will nor-
ndertake to issue such a bond on a profitable contract on
s of the extensive protection afforded the materialmen and
under the New York law as beneficiaries of a trust of the
s under the contract. The surety is subrogated to these
the event it is called upon to satisfy the bond. However,
fter examining the assessment list at the district office of
rnal Revenue Service, the surety discovers the existence of
ral tax lien, it will refuse to issue the payment bond or
an excessive price for it because, under the decision below,
vent it is called upon to satisfy the bond, the federal gov-
will have rights prior to those of the materialmen and

list is received by the Collector of Internal Revenue, 26 U.S.C. (1952 ed.) 3671. The question in this case turns on whether this defaulting taxpayer had any interest in the moneys which were deposited with the Clerk of the County which can legitimately be characterized as "property" or "rights to property" under the federal tax statute.

It is well settled that the determination as to what is "property" or "rights to property" under a federal statute is a matter of federal law. However, it is equally well settled that the nature and extent of the taxpayer's rights and interest in the moneys is a matter of local law.[5] "Since § 3670 creates no property rights but merely attaches consequences, federally defined, to rights created under state law, * * * we must look first to" the interests in the money "as defined by state law," *United States* v. *Bess*, Nos. 395 and 410, 1957 Term, decided June 9, 1958. Accordingly, we proceed now to consider the nature of the state-created rights in this state-created trust.

The fund in question arose by reason of the improvements made to Mrs. Bottone's restaurant by the petitioners herein. Until these improvements were made, there was no fund available to either the defaulting taxpayer or the the petitioners.[6] Immediately upon performance of the improvement by the petitioners, the fund came into existence—but did not belong to the defaulting taxpayer. Under New York law, even if the owner paid over the earned funds to the defaulting taxpayer (general contractor) its custody thereof was merely as trustee for the benefit of the subcontractors, laborers and material-

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[5] *United States* v. *Bess*, Nos. 395 and 410, 1957 Term, decided June 9, 1958; *Morgan* v. *Commissioner*, 309 U. S. 78; *United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587, 593 (dissenting opinion); *Fidelity and Deposit Corporation of Maryland* v. *New York Housing Authority*, 241 F. 2d 142 (C. A. 2).

[6] Certainly the execution of a contract between the taxpayer and Mrs. Bottone, without more, gave rise to no interest in the taxpayer to which the tax lien could attach.

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n whose work, labor and material created the fund, the extent of their unpaid claims. Of course, the state's aracterization of this fund as a trust fund is not con-sive for purposes of federal law. However, when we mine the rights and interests created by the state in h fund, we find that its characterization as a trust d is not merely a label, but that, contrarily, such trust reated by the state, both in law, fact and in every ailed respect just as any other money held under a t. In so far as it is possible for a legislature to make contractors, materialmen and laborers, such as peti-ers, the beneficial owners of the funds in question, the e has done so. This is at once apparent in the statute f, in its legislative history and in the treatment by courts of these funds, or the debt therefor, in varying ations.

ne statute itself provides that "The funds received contractor from an owner for the improvement of property are hereby declared to constitute trust funds e hands of such contractor to be applied first to the ment of claims of subcontractors, architects, engineers, eyors, laborers and materialmen arising out of the ovement." New York Lien Law, Section 36-a. More-the debt is also part of the trust: " • • • [T]he trust shall include the right of action upon an obligation moneys due or to become due to a contractor, as well oneys actually received by him.'" (Ibid.) Diversion

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his sentence is introduced by the phrase, "For the purpose vil action only." The legislative history of the phrase clearly strates, however, that by it the legislature intended simply to riminal sanctions to cases where the contractor diverted funds received, rather than extend it to cases where the contractor d the debt. Under the law prior to an amendment of 1942 t, as opposed to moneys received in payment thereof, was not the trust. In 1942 the legislature amended the law so that st fund included the debt as well as moneys in payment Also prior to 1942, it was not clear whether diversion of

(*Footnote continued on following page*)

of moneys in the trust fund is a felony: "* * * [A]ny contractor * * * who applies or consents to the application of such funds for any other purpose and fails to pay the claims hereinbefore mentioned is guilty of larceny and is punishable as provided in section thirteen hundred and two of the penal law." (Ibid.) Finally, this trust "may be enforced by a civil action." (Ibid.) As this Court has recently stated: "It would be anomalous to view as 'property' subject to [the federal tax] lien proceeds never within the [taxpayer's] reach to enjoy. *United States* v. *Bess,* Nos. 395 and 410, 1957 Term, decided June 9, 1958.

While the New York law also gives the subcontractors, laborers and materialmen liens on the improved property (New York Lien Law, Section 3), the trust, comprised of the funds earned, the debt for the work done and any moneys in payment thereof, are totally independent of and unaffected by the existence of the lien on the property. The trust may be enforced "by any person entitled to share in the fund,[8] whether or not he shall have filed, or had the right to file, a notice of lien

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(*Footnote continued from preceding page*)
trust funds resulted in civil liability or only in criminal liability. In 1942 the legislature resolved these doubts by specifically providing for civil enforcement. However, in so doing, it did not wish to extend criminal liability beyond what it was prior to the 1942 amendments, when the debt was not part of the trust. Thus, the sentence making the debt part of the trust res is introduced by the words "For the purpose of a civil action only." This history is explained in detail in "Act, Recommendation and Study relating to the Trust Fund Provisions of the Lien Law," 1942 Report, New York State Law Revision Commission 271-336:

"Under present law, the right to receive moneys which, if received would constitute trust funds, is not a trust res. This is a gap in the law. The Commission proposes that the trust res, for the purposes of a civil action only, shall be expanded to enable a beneficiary to reach such choses in action as well as moneys actually in the hands of the trustee. Existing criminal liability is in no way affected. 1942 Report, New York Law Revision Commission, 284.

[8] The procedure for the civil enforcement of the trust is set out in New York Lien Law, Sections 70-76.

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hall have recovered a judgment for a claim arising of the improvement." New York Lien Law, Section The fact that the mechanic's lien and the beneficial est in the trust are independent rights of the ma- lman or laborer is emphasized in a situation where naterialman or laborer may be the beneficiary of the while having no lien at all on the improved prop- This can occur in several ways, for example when mproved property is not located in New York. In a case, the subcontractor, laborer or materialman ave no lien on the "foreign" property by virtue w York law, but is nevertheless the beneficiary of the comprising all funds paid to New York contractor e improvement of the "foreign" property, or the to such funds. *Ridgefield Supply Co.* v. *Rosen,* 1 2d 675, 147 N.Y.S. 2d 337.

se trust provisions, as outlined above, are the result slation first enacted in 1929, and amended on several ns to resolve any lingering doubt that in all respects ds earned and/or the debt due for the improvement property are the beneficial property of the subcon- s materialmen and laborers and not of the general tor. See "Act, Recommendation and Study relat- the Trust Fund Provisions of the Lien Law," 1942 New York State Law Revision Commission, 271- he trustee is to have "all of the obligations of a of an express trust." 1942 Report, New York State vision Commission, 308. This principle has been l meticulously by the New York courts until the in the case at bar, when the court felt that federal pelled otherwise.

rbin-Kellogg Agency, Inc. v. *Tasker,* 248 App. Div. N.Y.S. 156, a judgment-creditor attempted unsuc- to reach a debt which was owed to the judgment- or the improvement of real property. In view of tanding claims of materialmen and laborers, the ed, *inter alia,* that "The money due the judgment-

debtor from the owner of the property improved constituted a trust fund belonging to laborers and materialmen. Lien Law, Section 36-a," 248 App. Div. at 61, 289 N.Y.S. at 160. Consequently the judgment-creditor could not reach the debt.

In *In re Einach's Estate,* 1 Misc. 2d 537, 146 N.Y.S. 2d 240, the trustee of one of these statutory trusts died insolvent. The question presented was whether administration expenses of the insolvent estate could be paid from the money realized on the debt which the decedent had held in trust. Under New York law administration expenses, being *charges on* the estate rather than *debts of* the estate, are paid prior to general creditors, lien creditors, and even prior to the priority claims of the state itself.[9] At least one New York court has held that a charge on the estate must be paid prior to a tax claim of the United States, which is given priority to all other claims by 31 U.S.C. 191 (R. S. 3466).[10] Nevertheless, the New York Court in the *Einach* case held that the debt in question belonged beneficially to the materialmen and laborers and hence was not available to satisfy either debts of or charges on the insolvent estate; thus the fund was paid to the materialmen and laborers, rather than to those who held claims for administrative expenses of the insolvent estate. The following cases are other examples of similarly broad readings which the New York courts have given to this statute. *Cranford Co.* v. *L. Leopold and Co.,* 298 N. Y. 676, 82 N. E. 2d 580, affirming 273 App. Div. 754, 75 N.Y.S. 512, affirming 189 Misc. 388, 391-2, 70 N.Y.S. 183, 185-186; *Wade* v. *Nassau Suffolk Lumber and Supply Corp.,* 275 App. Div. 864, 89 N.Y.S. 2d 294; *Ridgefield Supply Co.* v. *Rosen,* 1 Misc. 2d 675, 147 N.Y.S. 2d 337; *Waldman* v. *D. & V. Plumbing &*

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[9] *In re Einach's Estate,* 1 Misc. 2d 537, 146 N.Y.S. 2d 240, 242; *Matter of Franklin,* 26 Misc. 107, 56 N.Y.S. 858; *Matter of Ellis' Estate,* 110 Misc. 192, 179 N.Y.S. 873; *Barter* v. *Hawksworth,* 102 Misc. 242, 169 N.Y.S. 475; *Matter of Powers' Estate,* 75 Misc. 85, 134 N.Y.S. 967.

[10] *In re Stiles' Estate,* 126 Misc. 715, 215 N.Y.S. 134.

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Heating Contractors, Inc., 102 N.Y.S. 2d 787; *Rosicato* v. *Manera*, 192 Misc. 607, 81 N.Y.S. 2d 353.

Of even greater significance for purposes of federal law is the treatment of these trusts under the Bankruptcy Act, where the question is whether the contractor's interest in the trust res is "property" to which the trustee takes title under Section 70a of the Bankruptcy Act, 11 U.S.C. 110a, upon the contractor's bankruptcy. The question is almost indistinguishable from that in the case at bar.[10a] In *Wickes Boiler Co., Inc.* v. *Godfrey-Keeler Co., Inc.*, 121 F. 2d 415 (reversing 116 F. 2d 842), certiorari denied, 314 U. S. 686, the Second Circuit held that the trust res is not a part of the bankrupt's estate when the contractor becomes bankrupt.[11] The court rejected the Government's contention that such a holding contravenes the priority in bankruptcy set up in Section 64a (5) of the Bankruptcy Act, 11 U.S.C. 104 (a) (5). The holding in the *Wickes* case is in accord with both earlier and more recent bankruptcy cases in New York district courts, holding that these trusts are not part of the bankrupt's estate upon the contractor's bankruptcy. *In re Treister & Son, Inc.*, 145 F. Supp. 144, 146 (S.D.N.Y.); *In re Heintzelman Construction Co.*, 34 F. Supp. 109 (W.D.N.Y.); *Albert Pick Co., Inc.* v. *Travis*, 6 F. Supp. 486 (E.D.N.Y.).

[10a] In *United States* v. *Bess*, Nos. 395 and 410, 1957 Term, decided June 9, 1958, this Court construed "property" as used in Section 3670 consistent with its interpretation in the Bankruptcy Act, citing its construction in the Bankruptcy Act as authority for the construction in Section 3670.

[11] The Second Circuit initially determined that a genuine trust was not created by this statute, 116 F. 2d 842. This holding was based on the court's reading of New York cases which indicated that the trust did not become effective until a lien was filed. Later cases convinced the Second Circuit that its reading of these cases was erroneous, and on rehearing the court reversed itself, 121 F. 2d 415. The court's second view of the New York law was confirmed by the subsequently enacted amendments of 1942 which specifically provide for enforcement of the trust whether or not a lien was filed or could be filed. New York Lien Law, Section 36-a.

2. *The Tax Lien Precedents.* This is the first time this Court has been called upon to decide whether a trustee's interest in a statutorily-created trust is sufficient to characterize the trust res as "property" or the "right to property" for purposes of the federal tax lien law.

The most recent authority in this Court suggests that, based on the foregoing analysis of New York law, the federal tax lien does not attach to the debt because the beneficial interest did not belong to the taxpayer under New York law and hence was not the "property" of the taxpayer under federal law. *United States* v. *Bess,* Nos. 395 and 410, 1957 Term, decided June 9, 1958.[12]

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[12] A series of inapposite cases in this Court have determined the relative priority of liens: *United States* v. *Security Trust and Savings Bank,* 340 U. S. 47 (attachment lien); *United States* v. *City of New Britain,* 347 U. S. 81 (city tax lien); *United States* v. *Acri,* 348 U. S. 211 (attachment lien); *United States* v. *Liverpool & London & Globe Insurance Co., Ltd.,* 348 U. S. 215 (garnishment lien); *United States* v. *Scovil,* 348 U. S. 218 (landlord's distress lien); *United States* v. *Colotta,* 350 U. S. 808 (mechanics lien); *United States* v. *White Bear Brewing Co.,* 350 U. S. 1010 (mechanics lien); *United Staes* v. *Vorreiter,* 355 U. S. 15 (mechanics lien). These cases are inapposite to the instant case, however, because they involve only the relative priority of liens, not the meaning of "property and rights to property." After this Court's decision in *New Britain, supra,* ruling that, as between perfected liens, "the first in time is the first in right," the subsequent cases presented only the question as to whether the particular lien had been perfected. In all of them it was assumed that the property belonged to the taxpayer, which is the question at issue here. See *Fidelity and Deposit Co. of Maryland* v. *New York Housing Authority,* 241 F. 2d 142, 145 (C. A. 2). That these Supreme Court cases have no application to the type of question presented by the instant case was recognized even in *United States* v. *Kings County Iron Works,* 224 F. 2d 332 (C. A. 2), the case relied on by the New York court for its decision in the instant case. Said the court in *Kings County:*

> . . . [T]he federal tax lien can be defeated in one of three ways. Competing lienors may establish that the property on which the Government seeks to levy is not the property of the taxpayer at all. They may claim a prior specific and per-

(*Footnote continued on following page*)

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The most recent lower federal court decision construing "property and rights to property" under federal law is *Fidelity and Deposit Co. of Maryland* v. *New York Housing Authority*, 241 F. 2d 142, decided by the Second Circuit on February 8, 1957 and cited with approval by this Court in *United States* v. *Bess, supra.* Although *Fidelity and Deposit* is not on its facts squarely contrary to the case at bar, it is difficult, if not impossible, to reconcile the two cases on principle. The defaulting taxpayer in the *Fidelity* case had a contract with the New York Housing Authority on which construction had been completed. The materialmen and laborers, however, remained unpaid, and, under the contract, payments to the contractor did not become due until he supplied proof that the claims of materialmen and laborers had been satisfied. Accordingly, under the contract, no debt had arisen even though construction had been completed. The surety, Fidelity and Deposit, was called upon to satisfy these claims, which it did. It then sued, standing in the shoes of the materialmen and laborers, to recover the amount due from the New York Housing Authority to the contractor. The United States intervened with a claim on the basis of its tax lien. The Second Circuit unanimously concluded "that there were no rights of [the contractor] upon which the government tax lien could attach" (241 F. 2d at 144),

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(*Footnote continued from preceding page*)

fected lien entitled to precedence under the rule that 'the first in time is the first in right.' United States v. City of New Britain, 347 U. S. 81, 85, 74 S. Ct. 367, 370, 98 L. Ed. 520. Or, as long as the federal lien is unfiled, they may seek to bring themselves within the classes of creditors . . . which are specifically protected by I.R.C. § 3672 (224 F. 2d at 234-235).

A final case in this Court, *United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587, arose under 26 U.S.C. (1952 ed.) 3672 and construed the term "mortgage" rather than "property and rights to property" as in the instant case. To the extent it is apposite to the case at bar, the per curiam reversal, over the vigorous dissent of four members of the court, only emphasizes the need for judicial clarification in this area.

because no debt arose under the contract until the materialmen and laborers had been paid.[13] The court relied on a state court case which reached the same conclusion, *United States Fidelity and Guaranty Co.* v. *Triborough Bridge Authority*, 297 N. Y. 31, 74 N. E. 2d 226.[14]

If both *Fidelity and Deposit* and the instant case are allowed to stand, it will mean that the parties can accomplish by contract what the state cannot accomplish by statute, an anomalous result indeed. The trust provisions of the New York law were enacted for the benefit of the untutored laborer and materialman. It would be strange indeed if the federal law permitted the laborer or materialman to protect himself against an outstanding tax lien on the contractor only with the aid of a lawyer clever enough to have a Fidelity-and-Deposit-clause inserted in the contract between the contractor and the owner; but denied the New York legislature power to accomplish this same result by legislation. Yet this is the result if both *Fidelity and Deposit* and the instant case are law. It is perhaps understandable that these two decisions have left the profession and the construction industry in considerable confusion; both now look to this Court for clarification.[15]

The New York Court of Appeals did not consider *Fidelity and Deposit* controlling, but instead relied on an earlier Second Circuit decision, *United States* v. *Kings*

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[13] The court rejected a contention that because the surety had paid the materialmen and laborers, a debt did arise to which the lien could attach.

[14] The court in *Fidelity and Deposit* also distinguished the line of lien cases discussed, on the ground that in those cases the question "was solely one of priorities between two existing claims" (241 F. 2d at 145). "In none of those cases was there any doubt that a federal tax lien had attached to 'property or rights to property'" (*Ibid.*).

[15] The Government did not petition for certiorari in *Fidelity and Deposit.*

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County Iron Works, Inc., 224 F. 2d 232. On its facts, *Kings County* admittedly is precedent for the decision in the instant case. However, as interpreted by the Second Circuit itself in its later decision in *Fidelity and Deposit*, *Kings County* decided only that the state classification of the "reserve fund as a 'trust' [did not] preclude a federal inquiry into the nature of the right thus created." (*Fidelity and Deposit Insurance Co. of Maryland* v. *New York Housing Authority*, 241 F. 2d at 145.) In other words, *Kings County* is authority only for the proposition that the state label is not conclusive. "The court [in *Kings County*] did not inquire whether the state had created a right [in the defaulting taxpayer]. It assumed that it did . . ." (241 F. 2d at 145). Thus by the Second Circuit's own controlling decision, *Kings County* is not authority for the proposition for which it was cited by the New York court. Accordingly, the New York court in the instant case erred in relying on *Kings County* and in ignoring the later controlling decision in *Fidelity and Deposit*. Thus the only basis for the decision below—the decision in *Kings County* —is unfounded.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

CHARLES S. FRIEDMAN,
Attorney for Petitioners,
Aquilino & Spero.

JACOB I. GOODSTEIN,
Attorney for Petitioner,
Colonial Sand & Stone Co., Inc.

HAROLD M. EDWARDS,
KENNETH J. BRESKIN,
Of Counsel.

APPENDIX

(a) Opinion of Court of Appeals of New York.

FULD, Judge.

This appeal, here by our permission, involves the relative priority between a mechanic's lien and a federal tax lien.

Fleetwood Paving Corporation owes the United States Government a sum of money representing unpaid withholding and social security taxes. In December, 1951 and March, 1952, the local collector received assessment lists including assessments against the taxpayer. Some short time later, Fleetwood, as general contractor, entered into an agreement with one Ada

514

Bottone to remodel a restaurant which she owned in the Town of Eastchester. Thereafter, in August and September of the same year, 1952, Fleetwood arranged for Home Maintenance Company and Colonial Sand and Stone Company to furnish labor and materials for the remodeling job.

On October 31, 1952, the United States filed a lien against Fleetwood for its unpaid taxes (amounting on that date, with penalties and interest, to over $5,000) in the office of the clerk of the City of Mt. Vernon, where Fleetwood maintained its place of business. Some days later, having been paid only a part of what was due them, Home Maintenance and Colonial Sand filed mechanic's liens in the county clerk's office against the Bottone property for the balance owing, the former for $1,400, the latter for $896.25. In January, 1953, Colonial Sand obtained a judgment for $2,109.43 for materials sold on a number of Fleetwood jobs.

In June, 1953, separate suits were started by Home Maintenance and Colonial Sand to foreclose their respective liens and Bottone deposited $2,200, the amount still owing by her to Fleetwood, with the county clerk to the credit of

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th actions. On Bottone's motion, the government, which d levied against her indebtedness to Fleetwood, was terpleaded and substituted as defendant in her place.

Each of the three parties, the two plaintiffs and the gov-nment, moved for summary judgment under rule 113 of e Rules of Civil Practice. The court at Special Term anted plaintiffs' motions on the ground that the govern-ent's tax lien was ineffective since it had not been filed the county clerk's office, the place designated by statute r the recording of liens against real property. Although e Appellate Division affirmed the judgment, it disagreed th Special Term's rationale. It was the Appellate Divi-n's view that no debt was due from Bottone to Fleet-od to which the government's lien could attach: the fund posited by Bottone was a substitute for her real prop-y and, since the United States had no lien against such operty, it had no lien [2 A. D. 2d 747, 153 N.Y.S. 2d 270] pon the funds deposited in substitution therefor."

We cannot agree. On the basis of the controlling federal tute (Internal Revenue Code of 1939, U. S. Code, tit. 26, 3670, 3672, 26 U.S.C.A. §§ 3670, 3672), as well as the eral decisions construing it, the government tax lien ached to the debt owing to Fleetwood and that lien is itled to priority.

515

The Internal Revenue Code of 1939 provided, as does the sent code, a lien of exceedingly broad scope in favor of United States for unpaid taxes. The amount of the was to be "a lien * * * upon all property and rights to perty" belonging to the taxpayer and the lien "shall e at the time the assessment list was received by the ector and shall continue until the liability for such unt is satisfied" (§§ 3670-3671).

However, the statute went on to declare, "Such lien shall not be valid as against any mortgagee, pledgee,

purchaser, or judgment creditor until notice thereof has been filed by the collector * * * in the office * * * authorized by the law of the State * * * in which the property subject to the lien is situated" (§ 3672, subd. [a], par. [1]). By this state's law, the place provided for filing differs depending on whether the lien is asserted against real or personal property. In the case of a lien upon real property, the notice is to be filed in "the office of the clerk of the county in which real property subject to any such lien is situated" (Lien Law, Consol. Laws, c. 33, § 240, subd. 1), in the case of a lien upon personal property, "in the town or city where the owner * * * resides at the time the lien arises" § 240, subd. 2.

[1, 2] The "relative priority of the lien of the United States for unpaid taxes is," the Supreme Court has said, "always a federal question to be determined finally by the federal courts." United States v. Acri, 348 U. S. 211, 213, 75 S. Ct. 239, 241, 99 L. Ed. 264; United States v. Security Trust & Sav. Bank, 340 U. S. 47, 49, 71 S. Ct. 111, 112, 95 L. Ed. 53; People of State of Illinois ex rel. Gordon v. Campbell, 329 U. S. 362, 371, 67 S. Ct. 340, 345, 91 L. Ed. 348; United States v. Waddill, Holland & Flinn, 323 U. S. 353, 356-357, 65 S. Ct. 304, 306, 89 L. Ed. 294. Turning, therefore, to the federal decisions, we find the rule firmly established that, once a government tax lien is properly filed, no subsequently recorded lien or claim may prevail against it. See United States v. Colotta, 350 U. S. 808, 76 S. Ct. 82, 100 L. Ed. 725, reversing 224 Miss. 33, 79 So. 2d 474; United States v. Acri, supra, 348 U. S. 211, 214, 75 S. Ct. 239, 241; United States v. Liverpool & London & Globe Ins. Co., 348 U. S. 215, 217, 75 S. Ct. 247, 248, 99 L. Ed. 268; United States v. Scovil, 348 U. S. 218, 220, 75 S. Ct. 244, 246, 99 L. Ed. 271; United States v. City of New Britain, 347 U. S. 81, 84-87, 74 S. Ct. 367, 98 L. Ed. 520; United States v. Gilbert Associates, 345 U. S. 361, 365, 73

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S. Ct. 701, 97 L. Ed. 1071; United States v. Security Trust & Sav. Bank, supra, 340 U. S. 47, 50-51, 71 S. Ct. 111; United States v. Kings County Iron Works, 2 Cir., 224 F. 2d 232, 234-235, 237.

[3] In the case before us, the government concededly filed notice of its lien, in the office of the clerk of the city where the taxpayer

516

resided, before the plaintiffs filed their notices and, since such notice of lien is indisputably effective against all personal property and rights thereto belonging to the taxpayer (Lien Law, § 240, subd. 2), decision herein depends solely on whether the indebtedness due Fleetwood from Bottone constituted property of Fleetwood.

The lien filed by the government in October, 1952, before any mechanic's lien had been recorded, was manifestly not asserted against Bottone's real property or any realty possibly owned by the taxpayer. It was asserted against the contractual obligation of Bottone to Fleetwood, against Bottone's indebtedness to the latter, and, quite obviously, within the statutory terms personal "property and rights to [such] property" belonging to the taxpayer (U. S. Code, tit. 26 § 3670, 26 U.S.C.A. § 3670; see United States v. Kings County Iron Works, supra, 224 F. 2d 232, 234-235, 237; cf. Fidelity & Deposit Co. of Md. v. New York City Housing Authority, 2 Cir., 241 F. 2d 142, 144-145). Since the government did all that the applicable law demanded when it recorded its notice in the city clerk's office (Lien Law, § 240, subd. 2), its tax lien is superior to any other lien subsequently filed.

[4, 5] It is, by now, exceedingly well settled that no state-created rule may defeat the paramount right of the United States to levy and collect taxes uniformly throughout the land. See United States v. Vorreiter, 355 U. S. 15,

78 S. Ct. 19, reversing 134 Colo. 543, 307 P. 2d 475; United States v. White Bear Brewing Co., 350 U. S. 1010, 76 S. Ct. 646, 100 L. Ed. 871, reversing 7 Cir., 227 F. 2d 359; United States v. Colotta, supra, 350 U. S. 808, 76 S. Ct. 82, reversing 7 Cir., 224 Miss. 33, 79 So. 2d 474; United States v. Scovil, supra, 348 U. S. 218, 220-221, 75 S. Ct. 244; United States v. City of New Britain, supra, 347 U. S. 81, 84-87, 74 S. Ct. 367; United States v. Kings County Iron Works, supra, 224 F. 2d 232, 237. That being so, it follows that the provision in this state's Lien Law, to which respondents point—that funds received by a contractor from the owner for the improvement of real property shall be deemed "trust funds" for the payment of subcontractors (§ 36-a; § 13, subd. [7]—may not be construed to affect the rights of the government or the priority of its tax lien.[1]

517

The Kings County Iron Works, case, supra, 224 F. 2d 232, also involving the question of priority between the government's tax lien and a mechanic's lien in New York, is virtually indistinguishable from the present case. There, as here, a contractor, entitled to be paid by the owner of the real property which had been improved, owed money both to the United States for unpaid taxes and to his subcontractor for work performed. There, just as here, the subcontractor filed notice of its mechanic's lien against the property about a week after the government had filed notice of its tax lien at the place where the taxpayer-contractor maintained its place of business. There, too, the property owner paid the amount in question into court for judicial determination of priority between the government and the

[1] To the extent that Cranford Co. v. L. Leopold & Co., 189 Misc. 388, 391-392, 70 N.Y.S. 2d 183, 185-186, affirmed 273 App. Div. 754, 75 N.Y.S. 2d 512, affirmed 298 N. Y. 676, 82 N. E. 2d 580, suggests the contrary, it must give way to more recent federal decisions. See United States v. Scovil, supra, 348 U. S. 218, 221, 75 S. Ct. 244; United States v. Kings County Iron Works, supra, 224 F. 2d 232, 235 et seq.; and other cases cited above.

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mechanic's lienor. The district court awarded the latter priority on much the same grounds as did the trial court herein (122 F. Supp. 219, sub nom. United States v. Preferred Contractors), but, on appeal, the Court of Appeals for the Second Circuit reversed. It held that the debt owing to the taxpayer was subject to federal levy and was subordinate to the federal tax lien for either of two reasons; on the one hand, because the government filed notice of its lien first and, on the other, because mechanic's lienors, not being within the class of persons protected by subdivision (a)of section 3672 of the Internal Revenue Code, are in no event entitled to challenge a federal tax lien.

[6] Likewise, in the case before us, the government tax lien must be accorded priority for it too was recorded before either Home Maintenance or Colonial Sand filed notices of their respective liens and before Colonial Sand obtained its judgment. Moreover, since Home Maintenance never did become a judgment creditor, recent Supreme Court decisions impel us to add that its lien would have been subordinate to the federal tax lien even if it had been earlier recorded. See United States v. Vorreiter, supra, 355 U. S. 15, 78 S. Ct. 19; United States v. White Bear Brewing Co., supra, 350 U. S. 1010, 76 S. Ct. 646, reversing 227 F. 2d 359; see, also, United States v. Kings County Iron Works, supra, 224 F. 2d 232, 237.

The judgment of the Appellate Division should be reversed, and the motion of the United States for summary judgment in each action should be granted.

518

Conway, C. J., and Desmond, Dye, Froessel and Burke, JJ., concur with Judge Fuld.

Van Voorhis, J., dissents and votes to affirm.

Judgment reversed and matter remitted to Special Term for further proceedings in accordance with the opinion herein.

(b) Judgment and Remittitur of Court of Appeals of New York.

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 5th day of December in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

WITNESS,

The HON. ALBERT CONWAY,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, Clerk.

REMITTITUR December 5, 1957.

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No. 106

Action No. 1.

Robert Aquilino & ano., co-partners doing business under the firm name and style of Home Maintenance Co.,
Plaintiffs-Respondents,

vs.

United States of America,
Defendant-Appellant,

and

Fleetwood Paving Corporation,
Defendant,

and

Colonial Sand and Stone Co., Inc.,
Defendant-Respondent,

(and another action).

Be it Remembered, That on the 3rd day of April in the year of our Lord one thousand nine hundred and fifty-seven, United of America, the defendant-appellant in both actions, came hereunto the Court of Appeals, by Paul W. Williams, its attorney—and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Robert Aquilino & ano., co-partners doing business under the firm name and style of Home Maintenance Co., the plaintiffs-respondents in Action No. 1, Colonial Sand and Stone Co., Inc., the defendant-respondent in Action No. 1 and the plaintiff-

respondent in Action No. 2, and Home Maintenance Company, the defendant-respondent in Action No. 2, afterwards appeared in said Court of Appeals by Charles S. Friedman and Jacob I. Goodstein, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard these causes argued by Mr. Daniel F. McMahon, of counsel for the appellant—and by Mr. Harold M. Edwards, of counsel for the respondents Aquilino and Spero, and submitted by the respondent Colonial Sand & Stone Co., Inc., and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the matter remitted to Special Term for further proceedings in accordance with the opinion herein.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, thereto be proceeded upon according to law.

THEREFORE, it is considered that said judgment be reversed , &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York

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Appendix

COURT OF APPEALS, CLERK'S OFFICE,
Albany, December 5, 1957.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said causes in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

RAYMOND J. CANNON,
Clerk.

[See amendment as per Order of April 3rd, 1958, immediately following.]

(c) Order of Court of Appeals of New York Denying Reargument and Amending Remittitur.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the third day of April A. D. 1958.

Present, HON. ALBERT CONWAY, *Chief Judge, presiding.*

Mo. No. 195

Action No. 1

Robert Aquilina & ano., co-partners doing business under the firm name and style of Home Maintenance Co.,
Plaintiffs-Respondents,

vs.

United States of America,
Defendant-Appellant,

and

Fleetwood Paving Corporation,
Defendant,

and

Colonial Sand and Stone Co., Inc.
Defendant-Respondent,

(and another action)

A motion for reargument or, in the alternative, to amend the remittitur in the above causes having been heretofore

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made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> "Upon the appeal herein, as the opinion of the Court indicates, there was presented and necessarily passed upon a question under the Constitution of the United States, namely, the construction of provisions of the Internal Revenue Code (U. S. Code, tit. 26, §§ 3670-3672). Plaintiffs argued that such provisions were not decisive or controlling. This Court held to the contrary.

AND the Supreme Court, Westchester County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

[SEAL]

(d) Judgment Filed in Supreme Court, Westchester County, New York on Remittitur of Court of Appeals.

[SAME TITLE]

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Westchester, at the County Court House, White Plains, New York, on the 22nd day of May, 1958.

Present: GEORGE M. FANELLI, Justice.

The defendant, United States of America, having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, Second Department, in the office of the Clerk of the County of Westchester, on the 27th day of August, 1957, affirming the prior order and judgment of this Court heretofore entered herein in the office of the Clerk of the County of Westchester on March 28, 1955, granting the motion of plaintiffs in Action No. 1 and the motion of plaintiff in Action No. 2 for summary judgment, and denying the cross-motion of defendant, the United States of America for summary judgment; striking out the answers of said defendant, and adjudging that plaintiffs in Action No. 1 have a valid lien for the sum of $1,400.00 against a certain fund, and that the plaintiff in Action No. 2 has a valid lien against said fund the sum of $896.25, and from each and every part of said order and judgment of affirmance as well as from the whole thereof; and said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals

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having ordered and adjudged that said judgment so appealed from as aforesaid be reversed and the matter remitted to Special Term for further proceedings in accordance with the opinion herein; and the remittitur from said Court of Appeals having been filed herein and the order having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now on motion of Paul W. Williams, United States Attorney for the Southern District of New York, Attorney for defendant, United States of America, it is hereby

ORDERED AND ADJUDGED, that the order and judgment of said Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

ORDERED AND ADJUDGED, that the said order and judgment entered herein on March 28, 1955, granting the motion of plaintiffs in Action No. 1 and the motion of plaintiff in Action No. 2 for summary judgment, be and the same hereby is reversed and the cross-motion of defendant, United States of America, for summary judgment in each action be and the same is hereby granted; and it is further

ORDERED AND ADJUDGED, that defendant, Fleetwood Paving Corp., is indebted to defendant, United States of America, in the sum of $3,523.41; and it is further

ORDERED AND ADJUDGED, that the claim of the defendant, United States of America, is prior to and superior to the claims of plaintiffs and of the other defendants in both actions herein; and it is further

ORDERED, that the Commissioner of Finance, Westchester County, pay to the defendant, United States of America,

the Two Thousand Two Hundred and no/100 Dollars ($2,200), plus accrued interest, if any, and less fees allowed by law which is on deposit with him to the credit of this action, as shown in the certificate of the Commissioner of Finance, Westchester County, attached hereto, in partial satisfaction of the taxes due from Fleetwood Paving Corp. to the United States of America, upon presentation of two certified copies of this order.

Enter:

GEORGE M. FANELLI,
J. S. C.

EDWARD L. WARREN,
Clerk

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(e) The Federal Lien for Taxes.

Section 3670 of the Internal Revenue Code of 1939, 26 U.S.C. (1952 ed.) 3670, 53 Stat. 448, now appearing as Section 6321 of the Internal Revenue Code of 1954, 26 U.S.C. (1952 ed., Supp. II) 6321, 68A Stat. 779, provides as follows:

> If any person liable to pay any tax neglects or refuses to pay the same after demands, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Section 3671 of the Internal Revenue Code of 1939, 26 U.S.C. (1952 ed.) 3671, 53 Stat. 449, now appearing as Section 6322, 26 U.S.C. (1952 ed., Supp. II) 6322, 68A Stat. 779, provides as follows:

> Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(f) The New York State Lien Law.

New York Lien Law, Section 36-a, L. 1942, c. 808, Section 4, provides as follows:

> The funds received by a contractor from an owner for the improvement of real property are hereby declared to constitute trust funds in the hands of such contractor to be applied first to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, and to the payment of premiums on surety bond or bonds filed and premiums on insurance accruing during the making of the improvement and any contractor and any officer, director or agent of any contractor who applies or consents to the application of such funds for any other purpose and fails to pay the claims hereinbefore mentioned is guilty of larceny and punishable as provided in section thirteen hundred and two of the penal law. Such trust may be enforced by civil action maintained as provided in article three-a of this chapter by any person entitled to share in the fund, whether or not he shall have filed, or had the right to file a notice of lien or shall have recovered a judgment for a claim arising out of the improvement. For the purpose of a civil action only, the trust funds shall include the right of action upon an obligation for moneys due or to become due to a contractor, as well as moneys actually received by him.